No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney,
Post Office Building, San Francisco 1,

JOHN H. BLACK,

EDW. R. KAY,

HENRY W. SCHALDACH,
233 Sansome Street, San Francisco 4,

J. HAMPTON HOGE,
315 Montgomery Street, San Francisco 4,

Of Counsel for United States of America.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 11,620

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THEODORE F. BOVICH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF PLEADINGS AND JURISDICTION.

The libel is couched in two causes of action, the first cause of action being one for damages and the second cause of action being one for maintenance and cure. Appellee having heretofore deposited in the registry of the Court the sum of $945.00 in satisfaction of the decree, this Court need not be concerned with the second cause of action. We shall, therefore, direct our comments to the first cause of action alone.

This cause was plead and tried on three theories of negligence, viz.: (1) a negligent order, (2) the failure to provide a safe place in which to work, (3) negligence in the operation of the ship's gear being employed in loading.

The answer denied all allegations of negligence and affirmatively plead that the loading operations were being conducted by the United States Army (Ap. 13).

If liability for damages as a result of negligence of the United States Army or its enlisted personnel is to be saddled upon this appellee, jurisdiction lies only under the *Federal Tort Claims Act* (28 U.S.C. 921, et seq.), which became effective August 2, 1946, and by its terms applied retroactively as to any causes of action which arose subsequent to January 1, 1945. It is the contention of appellee that in order to charge the United States of America for the alleged negligence of the United States Army or its personnel that jurisdiction exists only under the provisions of the Federal Tort Claims Act.

STATEMENT OF THE CASE.

In addition to the facts set forth in appellant's statement of the case, appellee points out that at the time appellant was instructed to move the empty garbage cans to a forward position on the vessel that he knew the United States Army was working at the number four hatch, and at that time the port side of the vessel's deck was entirely clear and unobstructed (Ap. 58). As to these facts witness Kazem-Beck testified (Ap. 58):

> "Q. You knew the Army stevedores were loading that ship, didn't you?
>
> A. Oh, yes, sir, I did know it.

Q. You knew they were bringing in these crates?

A. Yes, I did.

Q. On the port side of the ship it was absolutely clear? Nothing was between the hatch and the bulwark?

A. Nothing except the stevedores loading the ship from the port side.

Q. It was absolutely clear, was it not?

A. That is right.

Q. Now, these cans were relatively light, weren't they? They were galvanized iron cans?

A. Correct, light cans, yes, sir.

Q. You could take them in your hands and lift them up?

A. Yes, you could.

Q. And when you were told to carry these cans forward, why, you were not told the way to carry them, what was to do it, what aisles to take?

A. No, we were not.

Q. You were just told to move the cans to some other part of the ship?

A. Correct, sir."

Witness Kazem-Beck also testified as follows (Ap. 62 to 63):

"Q. When you say the booms were on the port side, you mean the gear was over on that side?

A. That is right, sir.

Q. But the aisleway, as you testified, that 18-foot space, was clear, was it not?

A. The 18-foot space?

Q. Yes.

A. It was clear except for the two boxes standing on it.

Q. I mean the port side, not the starboard.

A. No boxes on the port side, no.

Q. As you testified before, that was clear, wasn't it?

A. It was clear, yes."

It was the starboard side of the deck on which the crates were being loaded and where the accident happened.

The appellant and the witness Kazem-Beck were not ordered to move the garbage cans in any particular way or over any particular route; they were merely instructed to move them from aft to amidship. The path to be traversed and manner of moving the cans were left to their judgment and discretion (Ap. 42-43).

The appellant himself testified (Ap. 85):

"Q. And, as you testified, I believe, and your witness here, you received orders to take these empty garbage cans and carry them to some part of the ship there?

A. Yes, sir.

Q. You were not told how to do it, by what route to go, were you?

A. No, sir."

The loading operations which appellant charges were negligently conducted were being performed entirely by United States Army. The appellant himself testified in this connection (Ap. 83):

"Q. Mr. Bovich, this loading operation that was being performed at the time, was being done by the Army stevedores, was it not?

A. Yes, sir.

Q. And the Army stevedores were handling the winches, and, of course, handling the loading and unloading gear of the ship?

A. As far as I know, sir."

Appellant cites a number of cases on page 11 of his brief as contending for the proposition that appellant is bound to obey an order even though the order required him to work under unsafe conditions. None of the cases cited are in any way pertinent and we will devote only a few words to each.

In the case of *Socony-Vacuum Oil Co. v. Smith,* 305 U. S. 424, involved defective appliances, viz.: a broken step.

Darlington v. National Bulk Carriers, 157 Fed. (2d) 817, concerned the use of a defective and unsafe paint spray which the injured seaman was ordered to use over his protest.

Armit v. Loveland, 115 Fed. (2d) 308, involved the failure of the shipowner to provide required splash-plates in the engine room after having been requested to do so by the injured. Because of the lack of such plates, the seaman was injured.

Reskin v. Minnesota Transit Co., 107 Fed. (2d) 743, involved a direct order to do a specific act in a specific way. The injured in that case was instructed to climb a vertical ladder with two shovels in his hand, leaving only one hand free, with the result that he fell from the ladder and was injured.

The cases of *Tampa Interocean S. S. Co. v. Jorgensen,* 93 Fed. (2d) 927, and *Holm v. Cities Service Transportation Co.,* 60 Fed. (2d) 721, cited by appellants, are cases which we believe uphold appellee's position herein and will be discussed along with other cases cited herein by appellee.

In *United States v. Boykin,* 49 Fed. (2d) 762, the Court found liability where a seaman was washed overboard as a result of the respondent's failure to properly navigate the vessel in a storm while the seaman was working on deck under specific orders.

The case of *Misjulis v. United States Shipping Board,* 31 Fed. (2d) 284, involved the use of defective rope that the injured seaman objected to using. In reply to his protest as to the insufficiency of the rope, the vessel's bos'n informed the injured seaman that the rope would not break and proceeded to haul the injured seaman aloft and before he could get out of the chair the rope broke causing the injured seaman to fall to the deck.

In the case of *Storgard v. France & Canada S. S. Corp.,* 263 Fed. 545, the Court held that the owners were under an obligation to provide a seaworthy ship and were bound to furnish the ship's equipment, including an allegedly worn and defective bolt in a seaworthy condition.

It will be noted that none of the foregoing cases relied upon by the appellant is in any way factually comparable nor do they assert any law with which we are concerned, save and except those of *Holm v. Cities Service Transportation Co.* and *Tampa Inter-*

ocean S. S. Co. v. Jorgensen (supra), which will be referred to hereinafter.

The order given in the case of *Matson Navigation Co. v. Hansen,* 132 Fed. (2d) 487, was not even remotely comparable to the instructions given here. In the *Hansen* case the vessel was at sea and in rough weather; the vessel was rolling, and Hansen was instructed to proceed on deck where it was necessary for him to climb on some steel beams which had previously been oil soaked, making the work unreasonably dangerous under the circumstances. In the *Hansen* case the injured seaman had no choice of methods or routes; he was under direct and specific orders and did not of his own volition place himself in a position of an obvious and known danger. The case is not even remotely in point.

In the case of *United States S. B. E. F. Corp. v. O'Shea,* 5 Fed. (2d) 123, the plaintiff was required to do certain obviously dangerous work on deck when the vessel was exposed to heavy seas which he protested and told the Captain that "It was impossible for any man to work down there without being killed from gas or killed by slipping as the vessel was beginning to roll * * *." He also told the mate that he could not put them on (manhole covers) because, "If he let go the lifeline he would get killed" and "that the oil was far down in the tank, so that it was not necessary to put the plates on and it was a dangerous job". To which the mate replied that he knew it but the Captain ordered them on. As in the case of *Matson Navigation Co. v. Hansen,* supra, O'Shea had no

measure of freedom of action but was compelled under penalties to obey the orders of his officers in a specific way and at a specific time and place.

Appellant relies on the case of *DeWitt v. United States,* 67 Fed. Supp. 61, and urges that appellee must be held responsible to appellant for the negligence of the United States Army which he characterizes equally with appellant at the time of his injuries as being in the maritime service of appellee. We believe such an interpretation of the *DeWitt* case farfetched. The *DeWitt* case involved injuries suffered after the termination of hostilities where such was not the fact in the instant matter. We frankly believe the holding in the *DeWitt* case to be erroneous and we can find no authorities where the subject has been decided by an Appellate Court. In order to impose liability for alleged negligence of the United States Army, its personnel must, of course, be shown to be fellow servants of the appellant.

This Court has previously spoken with respect to the differences between civilian fellow servants and the relationship of a soldier to his Government.

In the case of *Standard Oil Company of California v. United States,* 153 Fed. (2d) 958 (C.C.A. 9), at page 961:

> "* * * There are, it is granted, some resemblances between the master-servant and government-soldier relationships, but the distinguishing features are so great that we do not feel that the legislature intended the words 'servant' and 'master' in Paragraph 45 (c) to include within

their meaning the words 'soldier' and 'government'.

In modern times the freedom of an employee to enter into and to terminate a contract of employment might be said to be a major distinguishing factor between the two relationships. Labor's many other rights and privileges recognized today serve to distinguish even further the position of the modern employee from that of the soldier. Even in peace time a soldier who enlists is subject to many strict duties and disciplines which are never impressed on the ordinary employee. See e.g. Articles 58 and 61 of the Articles of War, 10 U.S.C.A. §§ 1530, 1533. But whatever the picture in peace, in times of national emergency it is the duty of the citizen to serve in the protection of his country and every citizen is a potential soldier under the conscription laws * * *

Thus the fact that this soldier (Etzel) had entered the Army under the draft for the duration of the war emergency makes the position of the soldier even less comparable to that of an employee. The trial judge ably points out the distinctions between soldier and employee at 60 F. Supp. 810. See also McArthur v. The King (Canada) (1943), Ex. C. R. 77 (1943), 3 D. L. R. 225."

A member of the United States Navy is not considered an employee of the United States within the scope of the Suits in Admiralty Act.

Dobson v. United States, 27 Fed. (2d) 807 (C.C.A. 2nd);

Bradey v. United States, 1945 A.M.C. 777.

In the *Bradey* case, a member of the United States Navy was injured in a collision between a United States naval vessel and another vessel which was owned by the United States of America and operated under the familiar form of general agency agreement.

The Court states:

> "Whether the 'Morton' be deemed a public vessel or merchant vessel, recognition of any right of a libelant to sue the United States of America for damages for decedent's injury or death even when caused by fault of another ship than decedent's is forbidden by the public policy stated in Dobson v. United States, 27 Fed. (2d) 807."

The Court in *McArthur v. The King* (1943), 3 D.L.R. 225 (Exchequer Court of Canada), after an exhaustive search of the authorities, concluded that the sovereign was not liable for the act of a member of the Armed Forces while on duty. This authority was cited in *Standard Oil Company v. United States,* supra. The Court said on pages 260, 261:

> "There is nothing to indicate in any way that the legislature go beyond the application of the doctrine of employer's liability to the crown in the field of negligence, or that it meant to include within the scope of the doctrine persons of a class or kind to whom the doctrine as it is ordinarily understood could not apply. * * * Before the Crown shall be held responsible for the negligence of such persons to whom the doctrine of employer's liability as understood as between subject and subject, would not apply, and where the relationship of the parties is so different from that of

> master and servant, or employer and employee, it will require language in the statute of the clearest and most explicit kind. Any such far-reaching extension of the liability of the Crown would have to be stated in the statute in express terms."

In the *DeWitt* case the Court held that the mere fact that the winch driver also served contemporaneously as a member of the Armed Forces would not defeat libelant's right to indemnity from the vessel. The Court reasoned that the soldier winch driver was serving in a dual capacity as a member of the ship's company and also contemporaneously as a member of the Armed Forces. The Court further goes on to say:

> "In considering and ascertaining whether or not the winch driver at the time, place and environment of the accident was engaged with the injured oiler in maritime duties within the meaning of the broad protective provisions of the statutes applicable to this libel, it should be noted that no wartime activities were then being performed by either. The work of each was essentially a post-war maritime service, not dissimilar in character to the duties performed by the injured man and the stevedore, respectively discussed by the Supreme Court in *International Stevedoring Company v.* Haverty, 272 U. S. 50, 1926 A.M.C. 1638."

It may be noted with interest that the *DeWitt* case was decided July 30, 1946, two days before the effective date of the Federal Tort Claims Act which retroactively applied to all the causes of actions aris-

ing subsequent to January 1, 1945 and applies to the instant cause. The Federal Tort Claims Act clearly gives a right of suit against the United States to appellant Bovich where one did not previously exist. Indeed, had it ever been conceived that the United States could be sued for such torts as is now claimed by appellant, there would have been no necessity for the Federal Tort Claims Act. Had Judge McCormick been advised of the existence of this consent to sue statute, he most certainly would have been saved the mental wrestling that was required to produce his opinion.

ARGUMENT.

The appellant argues that the appellee was required to work under unsafe conditions and that the dictates of common prudence demanded adequate supervision and direction of the work by some officer of the vessel. We believe that any seaman above a moron should not require any supervision to know how to safely carry a light, empty, garbage can on and along the deck of a vessel. The facts of this case are that appellant chose to carry this light-weight object by dragging it along the deck while walking backward between two seven-foot-high cases. He thus effectively concealed his presence from the operators of the vessel's gear, and by walking backward completely eliminated any possibility of his seeing or knowing what was occurring in the course of the vessel's loading operations into which he backed. In this connection, the appellant, Bovich, testified (Ap. 69):

"Q. (by Mr. Reynolds). Where was the can at the time the box pushed over against you?

A. It was between my leg.

Q. Which way were you facing?

A. I was going backwards.

Q. Backwards, and did you have the can above the deck?

A. Well, it was above the deck, yes, sir.

Q. Were you carrying it or dragging it?

A. Dragging it.

Q. You were backing up, dragging this can?

A. Yes, sir.

Q. And were between the two crates?

A. Yes."

We believe it elementary that a man crossing the deck of a vessel during the course of the loading of one of the hatches should be required at least to look forward when walking in the direction of the loading operations. This recklessness on the part of appellant can be compared only to the actions of a completely blindfolded seaman wandering around the vessel's deck during the course of loading operations. This was done at the exact time when a heavy case was being landed on the starboard deck of the vessel along which he had elected to proceed. The port side of the vessel was entirely clear and empty, it being some eighteen feet in width. Had a load been in motion across the port side of the deck appellant would have only had to wait a few seconds for the passing of the load in order to traverse the entire length of the deck in complete safety. This is the obvious route which any one even remotely concerned with his own safety

would have taken. He also had a choice of passage between the taffrail and the first box which was claimed to be slippery, but the mere fact that appellant's witness previously slipped while traversing this passageway does not necessarily constitute proof that appellant would likewise have slipped. It is obvious that appellant chose the most dangerous possible way of performing this simple task. He chose the only unsafe route and walked backwards and out of sight, when there was no necessity of any kind therefor.

At the risk of being repetitious, we again point out that appellant was not under any specific order as to the path or route to be followed nor the means to be employed. He had complete freedom of choice and made no objection of any kind to the instructions given to him by the bos'n. It is nothing short of ridiculous to state that the order to move the garbage cans placed in jeopardy the safety of the libelant. The mere fact that loading operations are being conducted at one of the vessel's hatches does not mean that all ship's business in the time of war must cease, particularly, when the order could have well been carried out in complete safety by using the clear port side of the deck and without danger to the libelant as was here the case. We respectfully suggest to this Court that an order to move a dozen light, empty, ordinary-sized garbage cans is not in itself a dangerous order. What made the task dangerous was the method employed by the appellant in fulfilling it.

THE COURT DID NOT ERR IN DENYING THE APPELLANT RECOVERY FOR DAMAGES.

We believe there is no question but that appellant here had a choice of routes, one safe and one unsafe and he chose the latter. This situation has been before the Courts on several occasions and the authorities clearly hold that where the seaman chooses the unsafe route he is precluded from a recovery.

The case of *Johnson v. United States* (2 C.C.A.) 74 Fed. (2d) 703, involved a three-island type vessel with wells in between. The crew were quartered in the poop, while the messhall was in the midship house. During heavy weather the deceased seaman instead of traversing a route that was open to him below deck through the shaft alley elected to cross the vessel's well deck, and in so crossing he was washed overboard. The Circuit Court in reversing the lower Court, dismissed the libel:

> "A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation. To find him negligent in crossing the well deck, as the trial judge did, and at the same time to hold that he did not assume the risk of such an obviously unsafe passage, was quite contrary to the whole doctrine of assumption of risk applicable to such cases and explained in our recent decision in Holm v. Cities Service Transportation Co., 60 F. (2d) 721, where the very question we have here arose. Accordingly, the libel should have been dismissed

unless the libelant was able to show that the respondent failed to take proper steps to rescue the seaman after he was washed overboard."

In the case of *Hardie v. New York Harbor Dry Dock Corporation* (C.C.A. 2), 9 Fed. (2d) 545, the deceased had two routes open to him, one obviously safe and the other of doubtful or unknown safety. The Court in affirming a judgment denying a recovery held:

HAND, Circuit Judge (after stating the facts).

"(1) We cannot see that the defendant failed to furnish the intestate with a safe way to his work. The route over the bridge deck was certainly such, and it was obviously open to those who did not care to use the dark route over the main deck between door and door. Two of the intestate's fellows had used it before him, and it was a compliance with the master's duty to furnish a safe way. If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him. Beulah Coal Co. v. Verburgh, 292 F. 34 (C.C.A. 8); Williams Cooperage Co. v. Headrick, 159 F. 680, C.C.A. 548 (C.C.A. 8); The Indrani, 101 F. 596, 41 C.C.A. 511 (C.C.A. 4.)

(2) It seems to us beyond any fair difference of opinion that the intestate knew the safe way and the possible dangers of the other."

The Court made the further pertinent observation at page 547:

"He knew and he chose; the defendant was not at fault for that choice."

In *Tampa Interocean S. S. Co. v. Jorgensen,* 93 Fed. (2d) 927, at 930 (cited by appellant), the Court, we think, properly held the following instruction to be the law:

> "You are instructed that if the plaintiff was furnished two methods of entering 'tween deck space, one obviously safe and the other obviously unsafe and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method, the defendant is not liable."

We agree with the holding laid down in *Holm v. Cities Service Transportation Co.,* 60 Fed. (2d) 721 at 723 (cited by appellant), wherein the Court held:

> "Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land * * *. So a seaman off duty who has gone for a drink of water and decides to return to his room over a deck he knows is slippery and may have oil collected in pools upon it, when he knows there is a safe though somewhat longer way for him to return, must be held to have assumed the known and obvious risks incident to his voluntary choice. The judgment should have been only for so much as the plaintiff was entitled to recover in his action for maintenance and cure."

Another case while involving slightly different facts is *The Nacoochee,* 275 Fed. 876. The libelant was ordered by the vessel's mate to oil the steering engine, which was located in a small room under the

pilot house. While he was doing so, the vessel gave a lurch and he was thrown off his balance and injured. The negligence charged was the failure to have the room properly lighted and ordering the libelant to do work for which he was not fitted. The Court in denying libelant's recovery stated:

> "The order to oil the engine was not negligence, unless it required the libelant to do something which was so dangerous and for which he was so ill-equipped that injury to him from obedience was likely to result, which was plainly not this case."

This Court in *Seas Shipping v. Ward* (C.C.A. 9), 22 Fed. (2d) 251, at page 252 stated:

> "For these reasons, we can see no escape from the conclusion that the working place was reasonably safe, considering the nature and purpose of the employment in which the appellee was at the time engaged, and that the accident was attributable solely and only to inattention on his part and to his failure to exercise reasonable and ordinary care for his own protection and safety."

We believe this instant case is clearly within the rule of *Seas Shipping v. Ward,* supra. As we have heretofore shown, this appellant's injury was clearly the result of his own free choice of a dangerous route and inattention on his part to his duties and in the lack of exercise of reasonable or ordinary care for his own protection and safety.

A case similar to that at bar is that of *Lynch, Admx. v. United States of America,* 1947 A.M.C.

780. The libelant chose a dark route and fell through an open hatch cover, whereas a lighted safe route was available to him. The Court in concluding its opinion states:

> "The Court is satisfied that the accident occurred not through the fault of the Bethlehem Steel Company, but the unfortunate choice by the libelant's intestate of an unsafe means of egress rather than the lighted passageway provided by his employer and of which he had knowledge. Hardie v. New York Harbor Dry Dock Corp., 1926 A.M.C. 75, 9 F. (2d) 454.
>
> The libel must be dismissed."

CONCLUSION.

It having been conclusively shown that appellant's injuries as suffered resulted directly and proximately from his own negligence and lack of ordinary, or any care, in the preservation of his own safety it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
September 29, 1947.

FRANK J. HENNESSY,
United States Attorney,
JOHN H. BLACK,
EDW. R. KAY,
HENRY W. SCHALDACH,
J. HAMPTON HOGE,
Of Counsel for United States of America.